IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 3147 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE A.L.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

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MB MAKWANA

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 3147 of 2002

MR CL SONI for Petitioner No. 1

MR GORI, AGP, for Respondent No. 1-2

CORAM : MR.JUSTICE A.L.DAVE

Date of decision: 07/08/2002

ORAL JUDGEMENT

1. The petitioner came to be appointed as a Clerk on 19.12.1986 and came to be posted in Taluka Panchayat office at Junagadh on 26.12.1986. The petitioner was then posted at Bhesan, after he undertook the training and was given a regular posting thereafter from 7.12.1987

in the office of Mamlatdar, at Talala (Gir).

1.1 The petitioner made an application for transfer to Sabarkantha district. After following the procedure, the State Government accorded sanction to the transfer of the petitioner from Junagadh district to Sabarkantha district by order dated 19th February, 1992. It was specifically stated in one of the conditions to the transfer order that name of the petitioner would be placed at the bottom of the seniority list in the Sabarkantha district and that the services rendered by the petitioner at Junagadh will be taken into consideration for purposes other than seniority. Accordingly, the petitioner went to Sabarkantha. While tendering application for transfer, an undertaking was taken from the petitioner incorporating the conditions stated in the order of transfer. Additionally, it was also stated in the undertaking that the petitioner would accept and abide by further conditions that may be imposed by the Government. The said undertaking was executed on 27.8.1991.

2. On completing 9 years of service, since the petitioner had not got any promotion, he applied for the benefit of higher pay-grade by application dated 5.8.1997 and it was forwarded to the higher office. Ultimately, that prayer of the petitioner came to be rejected on the ground that for considering the case of the petitioner for higher pay-grade, the services rendered by him in Junagadh district cannot be taken into consideration. Thereafter, on 21st March, 2000, the petitioner again made an application (Annexure-D) relying on decision of this Court rendered in Special Civil Application No.5403 of 1996 on 10.9.1999. That also came to be turned down. By order dated 3.11.2001 (Annexure-F), the benefit of higher pay-grade was given with effect from 18.5.2001. Indirectly, the request of the petitioner for considering his service in Junagadh district was turned down and, hence, this petition.

3. Learned Advocate Mr. Soni has submitted that, in view of condition Annexure-A dated 19.2.2002, transfer was made on condition that services rendered by the petitioner at Junagadh will be taken into consideration for all purposes other than seniority and while given higher grade, the question required to be considered is length of service and stagnation and not seniority. He, therefore, submitted that the order is arbitrary and in contravention of the conditions of transfer. He has relied on decision of this Court rendered in the case between K. M. Parmar v. Collector, Junagadh, Special

Civil Application No.5403 of 1996, on September 10, 1999. He also relied on decision of the Apex Court rendered in case between Scientific Officer to Raksha Mantri & Another v. V.M. Joseph, 1998 AIR SC Weekly 2226 and urged that this petition may be allowed.

4. Learned Assistant Government Pleader, Mr. Gori, submitted that the petitioner's services could not be considered for the purpose of higher grade in light of G.R. dated 31st March, 1994 bearing No.PGR-1194-40-M. He has drawn attention of this Court to paragraph 4 and illustration No.2 indicated therein, which provided that where an employee is transferred from one district to another on his own request, he loses his seniority and under the circumstances, he cannot claim benefit of higher grade on basis of his previous services. The illustration indicates that an employee obtains a transfer from Kheda district to Ahmedabad district losing his seniority, if there are 500 employees in Ahmedabad district, such employee would be placed at Sr. No.501 of the seniority list. If that employee has worked for eight years in Kheda district, he gets benefit of higher grade only after he completes 9 years in service in Ahmedabad district and not on completion of one year of service in Ahmedabad district. Mr. Gori submitted that, apart from this, the petitioner has given an undertaking to abide by all such conditions that may be imposed in future by the Government and, therefore, he is bound by the resolution of 1994 stated above. The petitioner is, therefore, not entitled to higher grade on basis of service rendered by him in Junagadh district.

5. Having regard to rival side contentions, it may be noted that at the time when the petitioner was transferred by order dated 19th February, 1992, G.R. relied upon by the respondent dated 31st March, 1994 was not in existence and the G.R. does not provide for giving a retrospective effect. It is also important to note that in the order of transfer, it is categorically stated that the petitioner will lose seniority and will be placed at the bottom of seniority list in Sabarkantha district and, more importantly, it is also stated that services rendered by him in Junagadh district will be taken into consideration for purposes other than seniority. Grant of higher grade is definitely a purpose other than seniority. Higher grade is given because of stagnation and non-promotion of the employee. Therefore, by virtue of condition stated in the order of transfer, the services of the petitioner in Junagadh district has to be and ought to have been considered by the respondent-authorities while considering his case for

higher grade. Coming to the contention that the petitioner has given an undertaking, it has to be noted that the undertaking is given on 27th August, 1991, probably at the time of making an application for inter-district transfer, wherein he has said that he would abide by the five undertakings stated therein and also by conditions that may be imposed in future by the Government. It appears that such condition came to be imposed by the Government in the order of transfer dated 19th February, 1992 (Annexure-A), as discussed above. It would not be prudent to interpret this clause in the undertaking to mean the case of the petitioner would be governed by all conditions - special or general - that may be imposed and to mean that such conditions may be given a retrospective effect. Similar question had arisen before this Court and a similar view was taken in the case of K.M. Parmar v. Collector, Junagadh (supra). However, the learned Assistant Government Pleader Mr. Gori states that the said judgment is carried in Letters Patent Appeal, which is still pending.

6. In this regard, the decision relied upon by Mr. Soni in the case of Scientific Officer of Raksha Mantri and Another (supra) would be relevant to be referred to. In that case, promotion was denied to the respondent on the ground that he had completed three years of regular service as a Store Keeper and, therefore, he could not be promoted earlier. While coming to that conclusion, the authorities had excluded the period of service rendered by the employee in the Central Ordinance Depot, Poona, as a Store Keeper and it was contended that since the employee had been transferred on compassionate ground on his own request to the post of Store Keeper at Kochi and was placed at the bottom of seniority list, the period of three years of regular service can be treated to commence only from the date on which he was transferred to Kochi. The Apex Court held that it was a fallacy, inasmuch as, the respondent had already acquired the status of permanent employee at Poona where he rendered more than three years' service as a Store Keeper. The Apex Court observed that eligibility of promotion cannot be confused with seniority as they are two different and distinct factors. In the instance case also, what the petitioner is praying for is higher grade to which he is entitled because of non-promotion and stagnation for a period exceeding 9 years and, therefore, condition in order of transfer-Annexure-A that services rendered by the petitioner in Junagadh district will be taken into consideration for purposes other than seniority will have to be taken into consideration in favour of the petitioner while deciding this aspect. Grant of higher

pay-grade is certainly a purpose other than seniority and the meaning sought to be given by the respondent to that condition is not correct and cannot be accepted. The petitioner's case, therefore, deserves acceptance. The order impugned herein dated 3rd November, 2001 (Annexure-F) is hereby quashed and the respondent authorities are directed to issue order afresh taking into consideration the services of the petitioner rendered in Junagadh district while computing period of nine years for grant of higher grade. Rule is made absolute accordingly. No orders as to costs.

7. Direct service is permitted.

[A. L. DAVE, J.]

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